IN THE SUPREME COURT OF THE UNITED STATES

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SHAKUR MUHAMMAD, AKA :

JOHN E. MEASE, :

Petitioner :

v. : No. 02-9065

MARK CLOSE :

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Washington, D.C.

Monday, December 1, 2003

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:01 a.m.

APPEARANCES:

CORINNE BECKWITH, ESQ., Washington, D.C.; on behalf of the Petitioner.

THOMAS L. CASEY, ESQ., Solicitor General, Lansing, Michigan; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:01 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 90 -- it's 02-9065, Shakur Muhammad, also known as John Mease v. Mark Close.

Ms. Beckwith.

ORAL ARGUMENT OF CORINNE BECKWITH

ON BEHALF OF THE PETITIONER

MS. BECKWITH: Thank you, Mr. Chief Justice, and may it please the Court:

The petitioner in this case, Shakur Muhammad, is a state prisoner who has brought a civil rights action alleging that a prison guard framed him on a false disciplinary charge in retaliation for his having exercised his constitutional right to seek redress in the courts for this same prison guard's previous misconduct. For three reasons, this Court should not graft onto this type of Section 1983 claim a favorable termination requirement that would make this prisoner have to win his claim in another forum before he can seek his remedy in Federal court.

First, the favorable termination requirement is a habeas protecting advice - device - that was borne of this Court's recognition that Congress would not have wanted a general civil rights action to be the vehicle for

undoing a state criminal judgment, particularly given the more specific habeas exhaustion requirement.

Second, extending the favorable termination requirement beyond this original rationale lacks any basis in the statute's terms or history, and it's devoid of the kind of common law pedigree that might suggest Congress envisioned a broader application to cases that do not look like habeas cases in that they don't involve a direct or an indirect challenge to the fact or duration of custody.

And finally, any remaining qualms about Congress' intent are resolved by the Prison Litigation Reform Act, where, after carefully weighing the interests of overburdened courts and of prison officials, Congress imposed an administrative exhaustion requirement, not a favorable termination requirement.

QUESTION: But I don't understand this about this case. I'm having an awfully hard time understanding this case, and - and it seemed to me what had happened was that the - your client, who's certainly well represented, he is sitting there at lunch and he makes some faces or gestures and the prison guard then has him up for a couple of charges and he basically is acquitted of the more serious one and they punish him for the more - less serious, threatening behavior, no, it's insolence or something like that.

He never says a word about retaliation, never says a word about it. He never appeals, which he could have done, his conviction. He never says to the prison authorities, hey, throw this out. The whole thing was based on the guard's desire to retaliate. And now suddenly have his - not having done any of that, we're in Federal court, and the Federal magistrate says, you know, he has no evidence of retaliation, or at least not enough.

And now we're up here arguing about Heck v. Humphrey, sort of like the Finnegan's Wake of the habeas corpus law, and I - I can't really understand how we even got here. I - I don't understand why, if you're right, this isn't an unexhausted claim, or at least the magistrate said you don't - your client, unfortunately for him, has not enough evidence. How do we get into this?

QUESTION: Well, I suppose one of the reasons you got into it was that the Sixth Circuit said that you had - had to comply with Heck against Humphrey, and you didn't agree with it.

MS. BECKWITH: Well, that's right, and you know, this is undoubtedly a valid First Amendment retaliation claim. The idea here is our - our client is saying, you know, he - he made perfectly appropriate allegations in the courts against this prison - this prison guard in prior lawsuits, and the guard set out to get him -

QUESTION: Can we reach this - I can't reach the Sixth - the question that the circuit thought was here. I don't see what we're supposed to say. What are we supposed to say? That - that this unexhausted claim, nonetheless, in 1983 states a claim?

MS. BECKWITH: It's not - I don't believe it's an -

QUESTION: If I said what I said, is that correct what I've said?

MS. BECKWITH: I don't think so, because it's not an unexhausted claim, and I believe the whole point of this case is the - is the misstatement of the law by the Sixth Circuit that would deem this a non-civil rights claim, basically a habeas claim completely contrary to this Court's precedent in Preiser. We have, you know, Preiser v. Rodriguez, which set up the way, you know, followed up on by Heck v. Humphrey, the way that we decide which way these cases should go. Is this a civil rights claim? It should go through 1983. Or is it something we're worried might swallow the habeas exhaustion requirement?

QUESTION: Well, does the Heck Humphrey issue that comes to us one that is affected by whether good-time credits are lost?

MS. BECKWITH: The - whether good-time credits

are lost is a - is a consideration and whether there is a fact or duration case.

QUESTION: Right.

MS. BECKWITH: And this case is nothing about -

QUESTION: So after all the briefing, the additional briefing that's gone on, do we know now for sure whether good-time credits are affected here?

MS. BECKWITH: I think we do. The most important point on that question, Justice O'Connor, is something that I - a point I unfortunately made in a footnote instead of in the text, footnote 6 on page 5 of the yellow brief, which I wish had been the first sentence of my issue in bold, and that point is that it doesn't matter, because we're not - no part of our constitutional claim challenges the insolence conviction.

QUESTION: But is - is that really the point? It's not what you challenge, it's the implication of what you want to be held.

MS. BECKWITH: It - that's right.

QUESTION: And those are quite different things. I mean, if in fact good-time credits are lost, even though you are not asking for any adjudication on good-time credits, then it necessarily follows that the length of the sentence can be affected, and it necessarily follows that at some point there could be a habeas claim because

the individual was not being released.

MS. BECKWITH: That's right, but there's nothing about this claim that would ever, you know, ever lead to the result, under the test necessarily imply the invalidity of the deprivation of good-time credits, which, by the way, I don't believe we were deprived of good-time credits, because of the reasons I state in my brief. Our client is a habitual offender and this claim was not raised in the lower court but -

QUESTION: Well, let - let's - could we just make a short excursus there? Assuming that no good-time credits are lost with respect to the minimum sentence, the point of - determining the earliest point at which he could be paroled, isn't it the case under state law that good-time credits still would be applied to the maximum sentence?

MS. BECKWITH: That - that is true. I don't believe that would ever -

QUESTION: Then - then isn't that the end of your argument -

MS. BECKWITH: I don't think so.

QUESTION: - because doesn't it - I mean, let me just finish -

MS. BECKWITH: Sure.

QUESTION: - my - my question so you know where

I'm going. If - if - if the good-time credits would apply to the maximum sentence, then it seems to me that if he is not released at the point at which he says he should be entitled to good-time credits, he's got a habeas claim.

MS. BECKWITH: I don't think that - I think that that aspect of the claim, you know, aside from waiver and aside from not challenging the conviction that led to the good-time credits, if they exist, is still not true, I don't think. It - it's too hypothetical. Most of these cases are like Preiser, where there would be immediate release. He has to serve his minimum sentence under Michigan law, so he's not ever going to get out earlier than his minimum. He - those will not be shortened by good-time credits.

After that, he's going to see the parole board several times. He's going to be 103 years old when he hits his maximum sentence. The likelihood that he would actually not be dismissed until his maximum sentence, you know, be discharged as opposed to paroled earlier than that and have his sentence terminated long before his maximum, you know, just makes it impossible that this would be anything but hypothetical -

QUESTION: Well, but for ease of judicial administration, do we really want to have to look at how old he's going to be and all of these things? Is it not

possible to say at the end of the day, good-time credits still apply to the maximum, so you're out of here?

MS. BECKWITH: Well, that may be true in another case, but it's not true in our case, because we're not challenging, you know, nothing about our constitutional claim would necessarily imply the invalidity of that insolence conviction.

QUESTION: Well, sticking with Justice O'Connor's question, suppose good-time credits were involved here, but insofar as the prisoner is concerned, it was wholly peripheral, and assume that the good-time credits would not click into operation for another 20 years. Would it make sense for us to insist on Heck v. Humphrey in those circumstances?

MS. BECKWITH: In - I mean, I think that - that Preiser created a clean line, and this Court has decided repeatedly that good-time - the loss of good-time credits falls on the fact or duration side of that line, and I think it makes sense to continue to maintain that clean line, and it's the kind of thing where good-time credits are the hard case. There's -

QUESTION: So you think it does - so you think that if good-time credits were unequivocally involved here, that the Heck rule would apply?

MS. BECKWITH: I don't - I - I think that's what

this Court's precedents would suggest. There might be room for reconsideration of the good-time credits in the future when it - when it starts to get real hypothetical or when there - if there might be some abuses, such as prison, you know, evidence that prisons were, you know, had the perverse incentive of tacking on good-time credits to -

QUESTION: Well, this is - this is very strange when we - when the original idea, I thought, of Heck was typing the kind of claim. I think the Court said in that case, this is not a prison condition case like my dietary law is not observed, am I not getting medical treatment, but it - it is like - there was an analogy to malicious prosecution, and here this has the same flavor, that this is - the complaint is that this guard had it in for me, and there were trumped up charges.

And the way you get around - would you say you're not really attacking the insolence, what he - he was convicted, so you're only concerned with the six days pre-hearing detention, but I don't see how you can, in all candor, chop up your complaint that way, because if the officer hadn't been retaliatory, the officer wouldn't have confronted him in the first place, he wouldn't have been insolent, and nothing would happen. So how you can say is, well, we'll accept the insolence but really we don't

because this is a retaliation and there never would have been any charge at all.

MS. BECKWITH: Well, I - that's - part - along the lines of the argument the respondent makes in trying to use a - sort of a but-for kind of take, or test, or a relevance kind of test, but that is not the test. The test is whether the claim, the constitutional claim, would necessarily imply the invalidity of the conviction or sentence -

QUESTION: I - I thought your response to that was that provocation was no defense to the charge -

MS. BECKWITH: That's right.

QUESTION: - to the charge of insolence.

MS. BECKWITH: The respondent is - is arguing that - that it goes to credibility. Credibility is not enough. That's about relevance or admissibility.

QUESTION: But is not your position, and I don't know that the other side has contested it, that provocation would not have been a defense to the charge of insolence?

MS. BECKWITH: That's right. There's no -

QUESTION: And therefore, your provocation claim does not invalidate the insolence conviction.

MS. BECKWITH: There's - there's - that's correct, Justice Scalia. There's no way of litigating -

QUESTION: How - how do I decide that, because that, it seems to me, is why I kept thinking I'm having trouble with this case?

MS. BECKWITH: Well -

QUESTION: It is inconceivable to me that under any law of any place that if a guard has gone and brought this whole thing about as a way of retaliating against a First Amendment right, I can't imagine a tribunal that wouldn't throw out the whole thing. I mean, I know you say, oh no, that isn't what they would have done. If he had gone to that disciplinary body and it said, look, I have proof here that this is total fake by the guard in retaliation for my First Amendment right, what that body would have said is, we convict you still of insolence but not of the greater charge.

That to me is inconceivable, but whether that's so or not is a pure matter of state law, and - and it seems to me that this case then turns on a pure matter of state law, because I think if it is totally separate maybe you're right. If it isn't totally separate, I don't see how you could be right.

MS. BECKWITH: And it is. I have several answer that. It is totally separate. You - you can't litigate the retaliation claim in - in a - in a prison misconduct hearing, just as Rodney King couldn't -

QUESTION: You couldn't - you couldn't say, hearing examiner in the prison, I want to tell you something. The guard's doing this because I filed some earlier claims against him. What - what would be so hard about doing that?

MS. BECKWITH: In fact, we actually - the hearing officer himself, in his deposition, which is at joint appendix 102 to 103, indicates he - he - retaliation was not a defense. It might go to credibility, but he can't consider that -

QUESTION: No, but that's a - that's an issue of fact. And the thing that's bothering Justice Breyer is the same thing that's bothering me, and that is it seems a - it seems like a very strange statement of law to say that there would be no retaliation defense, and if - and yet it seems to me you've got to say that in order to avoid Heck and Humphrey. So what's your basis for saying it? Do you have -

MS. BECKWITH: It's -

QUESTION: - any state law authority for saying that so that we could make that assumption that you are correct in your statement when we decide this case?

MS. BECKWITH: To tell you the truth, I just assumed it as - as a logical matter. It's like, as I was saying before, Rodney -

QUESTION: You assumed that in - in the - in the disciplinary proceeding for - that, let's say, in a disciplinary proceeding for insolence, he would not be - the prisoner would not have the opportunity of saying, he got me into this situation in retaliation for filing these actions? You just assumed that?

MS. BECKWITH: Right. It's just like assault on a police officer. If you're arrested because you're black and then you assault that police officer, you - you know, your - your 1983 claim on the illegal arrest is not, you know, it's - it's separate and apart from -

QUESTION: But we're talking here about insolence. I mean, he gave him a dirty look of something or other.

MS. BECKWITH: The - the hearing officer himself said that -

QUESTION: Well, is there any state law authority that we could look to?

MS. BECKWITH: I'm not aware of any and I'm sorry that I -

QUESTION: Well, it doesn't seem unreasonable to me. A police officer who's charged with a civil rights violation for - for whacking a demonstrator cannot please - plead as a defense, I was provoked. Doesn't matter if you're provoked, you're not supposed to do - do the act,

and I don't know why it would be any different with - with a prison inmate if - if he was provoked -

QUESTION: But he doesn't admit that.

QUESTION: - to resist the provocation.

MS. BECKWITH: And in any event -

QUESTION: What's so unreasonable about that?

MS. BECKWITH: - I think that what - whether we challenge the - the misconduct - the result of the misconduct proceeding in this case is really not relevant because -

QUESTION: Well, his - his complaint doesn't say the kind of thing you just said. I think his complaint says, I'm sitting there, the officer made some faces, lured me into this whole thing, and then what he charged me with was false. So I - I didn't see - it's what Justice Ginsburg, I think, was talking about at the beginning. I'm just - maybe you have nothing else to say on it, but I saw this being chopped up. I saw one incident, it being chopped up as if there were several things, one insolence, one threatening behavior, and then separating that out, and I got totally confused about the Heck v. Humphrey part, the exhaustion part -

MS. BECKWITH: The - the complaint is very clear. I mean, the gist - the most tangible part of - of the complaint is that I was overcharged, you know, and I had

to do pre-hearing detention, six days in pre-hearing detention that I would not otherwise have had to do because this guard was retaliating against me for suing him, for exercising -

QUESTION: This is the amended complaint. It was not his original complaint, and one of the many puzzling features in this case is the Sixth Circuit is addressing the original complaint, where this man says, I want the whole thing expunged, not that, yes, I was insolent, but I wasn't engaged in threatening behavior. The initial complaint said, this officer retaliated against me, the whole thing is no good, court, expunge the discipline. And it was only in the amended complaint that they came up with this theory, oh, insolence was all right, and the only thing that we're attacking is the threatening behavior.

MS. BECKWITH: Well, the two complaints are actually very similar, maybe identical, except for the - removing the request for expungement. And, of course, the Sixth Circuit's -

QUESTION: Well, isn't that a rather significant difference, because that says the whole thing is no good, the insolence is no better than the threatening, the whole thing is no good?

MS. BECKWITH: Mr. Muhammad was - was not

represented by counsel. He was - he was working pro se, and he amended his complaint. The amended complaint was accepted and that's - that's the complaint that's - that's before -

QUESTION: But that's not what - that isn't the complaint that was before the Sixth Circuit, so at a minimum, shouldn't we send it back to the Sixth Circuit -

MS. BECKWITH: No.

QUESTION: - and say, look, you looked at the wrong complaint?

MS. BECKWITH: Well, it was the complaint that was before the Sixth Circuit. They just made a factual error, and I think both parties agree it was a factual error, but it's one that didn't matter.

QUESTION: Nonetheless, they ruled on a complaint that is not the one he was complaining about.

MS. BECKWITH: But - but it doesn't matter, because they relied on Huey v. Stine and the case law in the Sixth Circuit. It wouldn't matter whether you asked for expungement or not if you are challenging the result, which the Sixth Circuit thought -

QUESTION: Excuse me. All of this is relevant why? Because of the issue of whether he's lost any good-time credit, isn't that right?

MS. BECKWITH: I don't -

QUESTION: Wasn't that issue waived by the other side and wasn't - wasn't there a finding? As I understand it, there was a finding by a - by the magistrate that plaintiff is no longer in the more restrictive custody of toplock or administrative segregation, nor in the more extended custody that would still faced him had he lost any good-time credit, and an issue was never made by the other side as I understand it, nor before the Sixth Circuit, that he had lost any - any good-time credit. Am I wrong in that?

MS. BECKWITH: That's absolutely right. The issue wasn't presented -

QUESTION: So it's waived. Why should we get into that here?

MS. BECKWITH: Right. And if - but if -

QUESTION: Especially having granted cert on a - on - on a significant question, to which that - that is - is preliminary.

MS. BECKWITH: That's correct, Justice Scalia, and if good-time credits are not at issue, it doesn't matter if we're challenging the insolence conviction, because nothing about this claim is going to affect the fact or duration of - of confinement, so that, you know -

QUESTION: Though the state does dispute you on the good-time credit, does it not?

MS. BECKWITH: The state does dispute. You know, I think they're wrong for four reasons.

QUESTION: But too late, but too late. Isn't that your point? They dispute you, but too late.

MS. BECKWITH: That is my point. I mean, that is my best point. My second best point -

QUESTION: Okay. If you're right on that point, then it's the easiest case ever, you're obviously right. If it has nothing to do with good-time credit -

MS. BECKWITH: Well -

QUESTION: - if you can chop up the - the action in that way, if all you're complaining about is six days that he spent in pre-trial detention and your winning on that would have nothing to do with anything else, would not set aside the rest of the - of the loss of good time or anything else, then you're obviously right.

MS. BECKWITH: That's right.

QUESTION: That's what she says.

(Laughter.)

QUESTION: Why is it an issue for us?

MS. BECKWITH: I agree. It's an issue because the respondent is trying to push the test of, you know, of Heck v. Humphrey into the context of misconduct proceedings, regardless of the punishment imposed. They say even -

QUESTION: You don't - you don't say that Heck against Humphrey should never apply to misconduct proceedings, do you?

MS. BECKWITH: No.

QUESTION: You just say it shouldn't have -

MS. BECKWITH: As in Edwards, it should definitely apply when good-time credits are lost or something else happens, you know, in the proceeding. I can't imagine what besides good-time credits, but if fact or duration is affected - in this case, fact or duration was not affected. This is a classic civil rights claim. We're talking about the First Amendment. It could have been about religion. It could have been about race.

QUESTION: Know what is very strange about this case is you've got these two threshold requirements. If it's a habeas line, then you can't skirt exhausting state judicial remedies. If it's a prison condition case, then you have the PLRA, you have to exhaust the internal remedies. Here, you didn't do either. I mean, if you take it on your case, this is really in the prison conditions line. You didn't even appeal internally.

MS. BECKWITH: But that's - that's not at issue in this case. The - the respondent complained in the courts below about exhaustion. It was considered by the lower court. The respondent said, you didn't seek

rehearing, and the magistrate judge said, I disagree with you, he didn't have to seek rehearing because he's not complaining about the insolence -

QUESTION: But, nonetheless, you are saying that this is a case that can go into court under 1983 even though there was - it's not on the habeas side so you don't have to exhaust the judicial remedies. It's not on the prison conditions side and you don't have to - you don't have to exhaust internal administrative remedies.

MS. BECKWITH: Justice Ginsburg, I absolutely disagree. He did exhaust. This was a question -

QUESTION: What did he exhaust?

MS. BECKWITH: He - he did everything he needed to do. The magistrate judge held that and the district judge affirmed that and it wasn't appealed -

QUESTION: Where? Because it seems to me that he didn't. He didn't ask for anything.

MS. BECKWITH: In -

QUESTION: He said - and he said, indeed, I'm not challenging, I'm not challenging the insolence conviction.

MS. BECKWITH: Record 68, the district court record in 68, unfortunately it's not in the joint appendix at - at 8 to 9 - pages 8 to 9, the magistrate held that Mr. Muhammad exhausted, without seeking rehearing he exhausted. And there was also a -

QUESTION: But can you tell me exactly what that was, because I don't see how he - he had?

MS. BECKWITH: Well, the -

QUESTION: He might have said he didn't need to exhaust.

MS. BECKWITH: No, the - the - the government filed a brief, a motion to dismiss, saying, you know, many things, but one of the things was he didn't exhaust his administrative remedies and they said because he didn't seek rehearing, respondent, or the - Mr. Muhammad responded, I didn't have to seek rehearing because I'm not complaining about the insolence. I agree I'm guilty of insolence. And the magistrate agreed. That's the end of exhaustion.

QUESTION: Exactly. But did he exhaust administrative remedies for what he's complaining about here, which is -

MS. BECKWITH: Right. There was no -

QUESTION: - which is not the insolence conviction, but rather the sixth - the sixth day lockdown or whatever he had pending the hearing on the higher charge.

MS. BECKWITH: As far as we know, he exhausted everything that he needed to exhaust.

QUESTION: Well, how - how could that be,

because -

MS. BECKWITH: The government -

QUESTION: I know they said that, and that's one of the reasons I'm having difficulty. You would have thought that if he was retaliated against, he would have said to the hearing examiner, I was retaliated against me, the whole thing is no good, I had six days that I spent, at least deduct the six days from the seven days additional punishment you're giving me. He didn't say that. Nobody knew a thing about it. He didn't ask for a rehearing. He didn't ask a judge - I mean -

MS. BECKWITH: I -

QUESTION: - what I'm worried about is writing an opinion in this that says you're completely right, and in the course of doing that by every assumption I have to make, so mixing up the law that nobody can understand what it is.

MS. BECKWITH: I understand. There - there's no doubt that the PLRA requires exhaustion of administrative remedies. It's not at issue in this case. It's not jurisdictional. Every circuit court to consider the issue has said it's not jurisdictional. The government raised the - the question. The lower court considered it. They - they ruled in our favor. It's not a part of this case anymore.

QUESTION: Is it raised on appeal?

MS. BECKWITH: It was not raised on appeal.

QUESTION: Was it raised in the brief in opposition?

MS. BECKWITH: In - in cert?

QUESTION: To the petition for cert?

MS. BECKWITH: No.

QUESTION: Not the state, from the district court or the court of appeals?

MS. BECKWITH: That's right, but it was not part of - of the government's response, failure to exhaust. It was decided in the lower court. It's - it's over.

QUESTION: Is - is it clear that the wrong of which he's complain - complains - is one of the wrongs set forth in the Prison Litigation Reform Act, or is this - is this some -

MS. BECKWITH: Yes. And in fact, that - that's one of our arguments that the Prison Litigation Reform Act reaffirms the - the clean line that was created in Preiser. You have fact or duration claims and you have conditions claims, Prison Litigation Reform Act, in - in creating an exhaust - an administrative exhaustion requirement for conditions claims, you know, indicates that this is the kind of claim that needs to exhaust.

QUESTION: If he had been charged initially just

with insolence instead of threatening behavior, that is bondable, but that doesn't mean that he would have been bonded, right? That's a discretionary determination.

MS. BECKWITH: That's right.

QUESTION: So it might have been the very same thing. The officer might have said, this is a bad guy, don't let him out until after the hearing. So, in one case, he can't get out because it's mandatory pre-trial detention. In the other - so this case is not about he had a right to be free, or free in the prison population those six days, but he could have argued that he should have been not locked up. Is that's what the - that's the whole thing that this case is about, right?

MS. BECKWITH: I mean, his - his claim is a First Amendment retaliation claim. The damages are this, you know, the chilling effect, the six days of pre-hearing detention, but that's just a remedial question. The claim is a valid one.

QUESTION: I thought he's suing for damages and that's the only thing he's suing for, not injunctive, nothing else. All he wants is money.

MS. BECKWITH: That's right. That's right.

QUESTION: And what he wants money is for the six days that he might have spent anyway.

MS. BECKWITH: He wouldn't have spent it anyway,

and you can see from the joint appendix at page 58, credit was not given -

QUESTION: No, I'm not talking about - it's bondable. There's nothing that shows that if the charge had simply been insolence they wouldn't have held him for the six days. He wasn't entitled not to be held.

MS. BECKWITH: That's purely speculative and a matter of remedy, not - not the right. Mr. Chief Justice, if I may reserve the balance of my time.

QUESTION: Very well, Ms. Beckwith.

Mr. Casey, we'll hear from you.

ORAL ARGUMENT OF THOMAS L. CASEY

ON BEHALF OF THE RESPONDENT

MR. CASEY: Mr. Chief Justice, and may it please the Court:

I agree this is a very confusing case. We believe there are several reasons why summary judgment should be affirmed. The first is that because Mr. Muhammad did lose good-time credits, and because of the nature of his challenge necessarily implies the invalidity of his misconduct determination, we think this case is controlled by Edwards v. Balisok.

QUESTION: Why didn't you waive the question of good-time credits? I mean, why - you - you heard the discussion before.

MR. CASEY: Yes.

QUESTION: Why - why is this something we should consider?

MR. CASEY: First of all, we believe it's - it's a matter of straightforward statutory - not even interpretation, just reading the text of the Michigan statutes on good time, so it's not some fact issue that - that can be waived. Secondly -

QUESTION: Excuse me? Only fact issues can be - legal issues can't be waived?

MR. CASEY: No, it's not a legal argument. This is a straightforward - a straightforward application of the statutory language that says he did lose good time.

QUESTION: You did not - did you make the point below that the other side has to lose because he lost good-time credit?

MR. CASEY: In our first motion for summary judgment, which was in 1998, we argued that Heck and Edwards controlled the case, that he was in effect challenging his good - or his misconduct hearing determination. The magistrate of the district court denied that motion, saying he is not challenging his misconduct. They agreed with his theory that this was a stand-alone retaliation case. So nobody - neither party nor the district court nor the Sixth Circuit got into the

fine points of the argument about whether this was a duration case or a conditions case.

QUESTION: Then why isn't it waived?

MR. CASEY: Well, we submit it's - it's a straightforward matter. It appears that the magistrate, in his opinion or his recommendation denying our motion for summary judgment, was under the impression he did not lose good time.

QUESTION: Okay. And let's assume the magistrate was wrong. As I understand it, you did not go to the district court and say, the magistrate is wrong on this point and this point can be dispositive under Heck. Am I correct?

MR. CASEY: We did not argue it in those terms. We argued, as I say, the broader application of Heck and Edwards to the effect that he was - the nature of his challenge necessarily implied that his -

QUESTION: But your position - your position as I understand was that even if he did not lose any good-time credits, that you - nevertheless, Heck controls.

MR. CASEY: Yes.

QUESTION: And that's the question -

QUESTION: And that's what -

QUESTION: - on which we granted certiorari. That's the question we - whether a plaintiff who wishes to

bring a 1983 suit challenging only the conditions rather than the fact or duration of his confinement must satisfy Heck v. Humphrey. Now, that question is not in the case, if indeed the duration of his confinement is what is affected. And did you respond in the brief in opposition by saying, actually, this question is not even in the case?

MR. CASEY: Yes. We -

QUESTION: But even if you did, it's not in the case, none of it's in the case on the assumption your colleague there was making, or your opponent. Imagine that Mr. Muhammad wins his claim in the 1983 action, which the fact that they thought didn't have enough evidence suggests he wouldn't, but suppose he did. Then he says, what I've showed was illegal under the Constitution or whatever, was, by being put in confinement for six days before my hearing, and my being charged with threatening behavior, that's it, that's all. The rest of it is all beside the point. I don't complain about my insolence. I don't complain about the seven days. I don't complain about the loss of good time. I don't complain about anything except the six pre-hearing days and the later dropped charge of threatening.

So, if he's right about that, if you can do that, if in fact his winning on that in no way calls into

question the conviction or the loss of good time or the seven later days for insolence, then under Heck, of course he can bring it.

MR. CASEY: Yes, that - that's correct. Heck - the favorable termination requirement of Heck only applies when the nature of the challenge necessarily implies -

QUESTION: Fine. So now I've got to the point that either she's obviously right or you're obviously right, and what it depends upon is a matter of state law, which is whether, as a matter of state law, should he win this claim, it is true that his showing the retaliation in respect to the six previous days and threatening in no way calls into question the validity of the insolence conviction, the seven days, and the loss of good time. So I say, what is the answer to that question of state law? Or a sister concluded - it's fairly obvious under the law that they are separate. Now what do you conclude?

MR. CASEY: We argue that they are not separate, that the nature of this challenge does in fact necessarily imply the invalidity of his misconduct determination. What he's challenging in this Federal lawsuit is retaliatory disciplinary action. That - that's the language that he used in his amended complaint. What he's saying is that the guard acted with an improper motive and that these adverse consequences flowed from that. The

only adverse consequences that he's alleging are involved in the misconduct hearing. So we don't think that the fact that he was found guilty of insolence and not threatening behavior has any bearing at all on this question. It was one incident, one charge that this particular hearing officer felt should be reduced to a lower charge, but the nature of his challenge, if - if Mr. Muhammad is correct that this guard acted unconstitutionally, there should not have been any misconduct charges, should not have been a hearing, should not have been any pre-hearing detention or post-hearing punishment.

QUESTION: Is - is - is that so? You - you think it, as a matter of constitutional law, you - you could not - you could not say that a prisoner has no right to threaten a guard even if he - even if he claims to have been provoked or has no right to insolent behavior even if he claims to have been provoked? As a matter of constitutional law, the prison cannot have such rules?

MR. CASEY: The Heck v. Humphrey analysis says that there were certain claims that are not cognizable on a money damage action under 1983. Our argument is this is such a claim. If a punishment imposed affects the duration of confinement, the loss of good time, then under Edwards v. Balisok, termination requires -

QUESTION: I'm saying it - it does not affect it if he would have been convicted anyway, and the contention of the other side is that he was guilty of the offense, both the major offense, if he had been guilty of that, and the minor offense, regardless of whether there was provocation on the part of the guard.

MR. CASEY: Correct. That - that's his claim. Our argument is that -

QUESTION: Well, why - why do you - why do you assert the opposite?

MR. CASEY: Well, that - that implicates the element of the common law tort of malicious prosecution, as discussed in Heck and Edwards, and those elements include favorable termination and probable cause.

QUESTION: But I think what you're not - this isn't an issue of whether provocation is a defense to a charge of insolence. I thought what you were saying is that this whole string never would have happened, nothing would have happened. If he - if he establishes the retaliation, then none of this would have happened, and it's just one episode.

MR. CASEY: Well, if - if he's correct that this retaliation is independent of the hearing process, that's - that's his argument. Our argument is that the only thing he's complaining about is the retaliatory action,

and the retaliatory action was charging him with misconduct. He -

QUESTION: Is not - not retaliation separate in the hearing process. You're saying, is his point that when the guard looked at him from outside the cafeteria and made faces at him, and then he came in, and then the prisoner stands up and gives him some very dirty looks, according to the guard. Now, if you can separate out there the retaliation, if you can separate out there what the guard did by way of retaliation, making some very bad faces through the window, and insolence under state law, which would exist even if the guard were badly motivated in making the bad faces, then you've got your two separate things.

MR. CASEY: Under Sixth Circuit law, to establish a claim for retaliation, there has to be protective conduct that the inmate engaged in and there has to be adverse action taken against that plaintiff that would deter a person of ordinary firmness from continuing to engage -

QUESTION: Fine. And the - and the conduct -

MR. CASEY: But that's -

QUESTION: - of the prisoner that's retaliation is that - that - has to do with that -

MR. CASEY: No, conduct of the guard.

QUESTION: - would be his threatening look, but not his insolent look.

MR. CASEY: If this situation had proceeded exactly as petitioner alleges up to the point where they were nose to nose for a few seconds and then they had both walked away, there would be no retaliation claim, there would be no constitutional violation at all. The only thing that gives rise to a constitutional right is the adverse action of charging him with misconduct. That's why we say that this charge is necessarily implicated in the hearing process. It necessary - necessarily implicates that his misconduct determination is invalid.

If he's right that there should have been no charge at all, if he's right on that, then the Heck v. Humphrey analysis doesn't even come into play. We think he's wrong on that. The - the district court felt he was right on that and - and ruled against us on our Heck v. Humphrey motion. The Sixth Circuit in effect said we were right on that, that the nature of this challenge does implicate the hearing process, and under Sixth Circuit precedent, they said, therefore, it falls.

QUESTION: But the Sixth Circuit was addressing a complaint that looked like it was attacking the whole thing, because it asked for expungement of the disciplinary - of the disciplinary action. Why didn't you

call to the - or whoever was representing Michigan at that stage - call to the attention of the Sixth Circuit that it had addressed the wrong complaint?

MR. CASEY: The Sixth Circuit issued its order. The petitioner filed a motion for rehearing. Under the court rules, we're not permitted to respond to that, but our argument is that even though the Sixth Circuit -

QUESTION: You could have made a motion to remand or something.

MR. CASEY: We could have, but we did not. In retrospect, I wish many things had been done differently in this case.

QUESTION: Well, do you aggrieve, looking at the Sixth Circuit opinion, that it was examining the original complaint, not the amended complaint?

MR. CASEY: It referred to the original complaint, but the - the holding of the Sixth Circuit on page 106 of the joint appendix, they say in an earlier Sixth Circuit case, and they quote it, in order to grant the plaintiff in this case the release he - relief he seeks, we would have to unwind the judgment of the state agency. That is the basis on which they affirmed the judgment.

QUESTION: I thought you agreed that the Sixth Circuit was looking at the initial, original complaint,

not the amended.

MR. CASEY: That they - they mentioned the initial complaint and not the amended complaint. That's correct.

QUESTION: Yeah.

MR. CASEY: But we believe that the rationale that they used, that his challenge did implicate the validity of his misconduct hearing, is correct on both his original complaint and his amended complaint.

QUESTION: May I ask you a hypothetical question? Assume we had the case with the same facts except the remedy a different - if the, say the prison authorities had said you can't use your television set for 30 days and that was the only remedy and otherwise everything else was the same, and he said it was - they did that in retaliation because I exercised my First Amendment rights. If that were the discipline, would Heck v. Humphrey preclude relief in this case?

MR. CASEY: Yes, we believe - that's the question the Court granted cert on. If a punishment affects only conditions -

QUESTION: And that's the one we probably ought to hear some argument about.

MR. CASEY: That's - that's correct. I - I agree, Your Honor. We argue that -

QUESTION: And why would it preclude relief in that case? That's what I'd be interested in hearing.

MR. CASEY: Because as in the Edwards v. Balisok and - and Heck v. Humphrey, the proper method of analysis is to look to the most closely analogous common law tort, look to traditions of common law, public policy considerations in light of the purposes of Section 1983. In Heck v. Humphrey and Edwards v. Balisok, the Court said, in the prison context - prison disciplinary context, the favorable termination requirement applies. On the facts of those cases, there was good time involved, so duration -

QUESTION: More than the facts of the case, we - the reason we - we - we adopted that common law rule was to prevent a collision between 1983 and habeas corpus law and prevent 1983 from being used as an end-run around habeas corpus limitations.

MR. CASEY: Again, on - on the facts of the case, that's - that was the situation presented, because in that case there was a collision between the habeas statutes and the 1983 -

QUESTION: And that collision was - was in the reasoning of the Court. It isn't -

MR. CASEY: Yes, it was. But additional reasoning was based on common law traditions and we argue

that that same rationale applies even if good time is not involved, even if it's just conditions of confinement as punishment.

QUESTION: So that even if setting a - a ruling in favor of the plaintiff would not in any way call into question the prison disciplinary proceeding, it still should - Heck should still apply?

MR. CASEY: No. If - if the nature of the challenge does not imply that the misconduct determination is invalid, then the Heck v. Humphrey analysis doesn't apply. It's not analogous to the common law tort of malicious prosecution. We don't assert that the favorable termination requirement applies to all conditions cases. We say it only applies when a claim for money damages is attempted which - the nature of which necessarily implies that the misconduct hearing is invalid.

QUESTION: Well, it looked like the Sixth Circuit is on the short side of a five-to-one split among the courts of appeals on how Heck v. Humphrey is to be applied, that the Sixth Circuit views it differently than the other circuits that have addressed it.

MR. CASEY: I believe that's correct.

QUESTION: Do you agree?

MR. CASEY: I believe that's correct.

QUESTION: Yeah, based on -

QUESTION: How - how is -

QUESTION: - its own Huey decision, and I really thought very likely that was why this Court granted cert here, to see whether the Sixth Circuit rule is out of step with what we said in Heck v. Humphrey.

MR. CASEY: The Sixth Circuit, and all of the court of appeals' decisions that have attempted to apply the Heck v. Humphrey analysis to conditions cases, are necessarily involved in - in extension of the Heck rationale to this other factual context, because Heck and Edwards involved good-time losses. I agree that's - we assume that's why the Court took the case. When we filed our brief in opposition, we suggested that there are these alternative reasons why the Court should not grant cert. One of them was the loss - that he did in fact lose good time, but -

QUESTION: But, of course, that conceivably was waived, because you didn't get into it below. If we - if we disregard that and think that you waived this issue of good-time credits, and if we reach the merits on which I assumed we granted the case, then what justifies the Sixth Circuit rule? Do you say just because damages potentially are at issue that the 1983 claim can't go forward?

MR. CASEY: A - a claim for damages cannot go forward unless there's favorable termination. If his

claim was for an injunction changing the hearing procedures somehow, as in Edwards, that type of claim could go forward.

QUESTION: I don't see the difference in the Sixth Circuit rule anymore. What - in what respect is it in the minority? I thought you were reading now, as I heard you, the last or the next to last sentence in the opinion -

MR. CASEY: That's - that's correct.

QUESTION: - that the Sixth Circuit simply thought that if this individual wins, if Mr. Muhammad wins, they would have to unwind the entire judgment of the hearing, which would include the judgment having to do with insolence.

MR. CASEY: That's correct.

QUESTION: And so if that's what they base it on -

MR. CASEY: That's correct.

QUESTION: - is their rule different from that of any other circuit?

MR. CASEY: The way the Sixth Circuit is different from most of the other circuits is that they apply the Heck v. Humphrey analysis to punishments of conditions and not just to punishments affecting the duration of confinement.

QUESTION: What is the condition -

QUESTION: They meaning the Sixth Circuit?

MR. CASEY: The Sixth Circuit applies it to conditions, punishments, and duration punishments.

MR. CASEY: What do you mean by a conditions punishment?

QUESTION: The - the punishments that Mr. Muhammad received were the loss of good time, confinement to administrative segregation, essentially remaining in his cell, plus loss of privileges for 30 days. So only the loss of good time affects the duration of his sentence -

QUESTION: Thus, only the loss of good time could have been challenged in habeas?

MR. CASEY: Correct.

QUESTION: And the conditions couldn't have been challenged in habeas?

MR. CASEY: Correct.

QUESTION: And that's the distinction -

MR. CASEY: The distinction in this case -

QUESTION: - that the other circuits think is crucial?

MR. CASEY: Correct. In - in conditions challenges, habeas corpus relief is not available, so there will be no other Federal court remedy if a Federal civil rights action is not available.

QUESTION: And it - it's your position that there should be no remedy whatever for this person?

MR. CASEY: It's our position that if he is -

QUESTION: If - if - we're disregarding the good-time credits. That's waived, that's out of here. Let's just make that assumption. And you say that he's out of luck on pursuing any remedy for anything else?

MR. CASEY: Prisoners who seek to challenge the nature of their complaint seeks to challenge or call into - whose challenges necessarily imply that a prison misconduct is invalid, do not have a Federal Civil Rights Act case of action, whether it - whether the punishment -

QUESTION: And other circuits disagree. They say that in this case it would relate to conditions, and therefore, the 1983 suit could go forward.

MR. CASEY: Correct.

QUESTION: That's the difference?

MR. CASEY: Correct. And the difference was created because the majority in Heck based much of its decision on a rationale of the common law. A concurring opinion in that case, signed by four justices, said, no, we're not going to base it on that rationale because that might mean that there would be no Civil Rights Act remedy in any such case. Subsequently, in the Spencer v. Kemna, one of the judges who - or justices - who had been in the

majority changed her mind and is now agreeing with the rationale of the concurring opinion in Heck. So that's why the Sixth Circuit, or that's why the courts of appeals are split on this. On the facts of Edwards and Heck it involved just duration claims, but depending on the rationale for the rule, it may or may not apply to conditions cases. We say it does apply to conditions cases because -

QUESTION: And the condition here - and one thing is the abstract level on which you're speaking, the other is concretely what this case is about. This case is about six days spent in pre-hearing detention. It's the only thing that money is sought for. Now, we're told that insolence is bondable, threatening behavior is not. Does bondable mean it will be bond? What is the incidence? What practically is the effect?

MR. CASEY: Some - some major misconducts are mandatory non-bondable. Threatening behavior, the original charge, was mandatory -

QUESTION: So insolence is not mandatory. What is the practice in the prison? Is it common to let people -

MR. CASEY: On - on page 14 of the joint appendix we've quoted from the policy directive, and the standard is, if there is a reasonable showing that failure to do so would constitute a threat to the security or good order of

the facility, so on a case-by-case basis, a prisoner charged with a bondable major misconduct could be placed in pre-hearing detention.

QUESTION: Well, when you say bondable, I mean, you don't mean if a person posts a bond they're out on the street?

MR. CASEY: No, no. That - that's the phrase used in these prison directives.

QUESTION: But that's what this case is about, those six days when he was in administrative detention.

MR. CASEY: Those are the six days for which he is seeking damages.

QUESTION: And - and do you have, rather than being in the general prison population, do you have any statistical indication of - on charges of insolence, are people more often than not, or is it rare that they would be in administrative detention awaiting the hearing?

MR. CASEY: I - I don't have the statistics of - the Department of Corrections probably could compile that, but I don't know. I do know that there were last year more than 72,000 major misconduct hearing of all kinds, bondable and non-bondable. I do not know how many of those 72,000 resulted in pre-hearing detention.

QUESTION: But was - was this argument raised below that there's no cause of action because there's no

assurance that he wouldn't have been kept for six days anyway, even if it was bondable? You - you didn't defend on that ground, did you?

MR. CASEY: It was not argued in those terms, no. As I said, the case was argued -

QUESTION: Why do we want to get into that? I - I don't understand.

MR. CASEY: No. We did not argue the - the terms of the bond versus non-bondable, because it simply didn't come up.

QUESTION: So suppose now - I think Justice O'Connor may be causing the light to dawn in my head - suppose you're right, suppose that there is just one ball of wax. Suppose the - this is all a waste of time trying to separate those two things. There's just one thing. There's a conviction, all right?

MR. CASEY: Correct.

QUESTION: Now, we look to see what happens if he wins. If he wins, we set aside the whole conviction, but good time is out of it. And since good time is out of it, of course he can bring a 1983 action, because this wasn't the kind of thing that habeas was designed for. Habeas was about duration of - of staying in prison, and with good time out of it, it doesn't matter whether it's one ball of wax or two. He can go in on 1983 since there's no

conflict with the habeas statute. What's your response to that?

MR. CASEY: Our response to that in - in - in response to the question that the Court granted certiorari on is that even if good time was not at issue in the case, if the only punishment he received affected the conditions of confinement, our argument is, it's still appropriate to look to the traditions of the common law and public policy considerations to determine whether a cause of action in those circumstances is cognizable in 1983. We've argued that it is not cognizable. If he is challenging the validity of his misconduct determination, that's analogous to the common law tort of malicious prosecution.

The elements of that tort require favorable termination before it can succeed. We believe that - that same element applies in a 1983 case. So if he does not get favorable termination of his prison misconduct, he cannot bring a suit for damages under 1983.

QUESTION: It is essential to your argument, is it not, that provocation would be a defense?

MR. CASEY: No.

QUESTION: No?

MR. CASEY: Whatever - whatever charge -

QUESTION: If provocation would - would not be a defense, then even if he establishes provocation, for

which he can get damages, he would not be impairing the judgment against him.

MR. CASEY: One of the elements of the constitutional cause of action for retaliation is adverse action against the prisoner because of his protective conduct. The adverse action in this case is not the staring down and the nose-to-nose confrontation. The adverse action is charging misconduct, and we say, if he's right in his complaint that there would not have been a misconduct charge but for this action, that necessarily implies that the misconduct proceeding is invalid, and that triggers the analogy to malicious prosecution and its element of favorable termination.

QUESTION: So that you say basically, the importance of Heck and Humphrey here is the way it says you ought to refer to common law analogies in analyzing whether there ought to be a 1983 action, and that has nothing to do in the final analysis with whether there's a collision between habeas corpus and 1983. That is an - that is an independent requirement of the way you go about analyzing 1983 actions.

MR. CASEY: Yes, that's correct.

QUESTION: So that even though there isn't a habeas corpus problem, you still go through the same methodology?

MR. CASEY: Correct. You say the same methodology applies whether it's just conditions or duration of confinement. If it's a -

QUESTION: Are you essentially making an exhaustion of - of state remedies then? It seems to me - are you - you're not saying that this person would have no complaint, no Federal complaint, not in habeas, not in 1983? Are you saying that -

MR. CASEY: Yes.

QUESTION: - or are you saying 1983 is premature?

MR. CASEY: If he gets favorable termination. We say -

QUESTION: Where does he get the favorable determination?

MR. CASEY: The - if he got favorable termination by review of the misconduct - if he - if he had won at the misconduct or if he had appealed and won on appeal, that would be favorable termination.

QUESTION: So you're saying essentially he hasn't exhausted his internal administrative remedies, and that's why the 1983 is improper?

MR. CASEY: We say the - his failure to exhaust is another independent reason why he does not have -

QUESTION: You're saying he has to both exhaust and prevail?

MR. CASEY: That's correct. They're independent requirements.

QUESTION: And that seems somewhat inconsistent with at least the negative implication of the Federal statute, which says all he has to do is exhaust.

MR. CASEY: Well, the - the Court addressed that question in Heck v. Humphrey, and it said that even if a person exhausts his remedies, if he has not favorably terminated, he cannot bring the lawsuit unless and until he gets favorable termination. They're - they're independent. The exhaustion requirement -

QUESTION: Well, that's the Heck v. Humphrey's gloss, but that's an additional requirement. Usually exhaustion does not require prevailing.

MR. CASEY: Well, that's correct. That's correct. The - the reason he has to get favorable termination in this case is because of the analogy to -

QUESTION: Yes.

MR. CASEY: - malicious prosecution.

QUESTION: Right. It - it usually does not require prevailing, but it does require prevailing when - when your cause of action is that - that you have been subjected to the law improperly.

MR. CASEY: That's correct. That's our argument.

QUESTION: Thank you, Mr. Casey.

MR. CASEY: Thank you very much.

QUESTION: Ms. Beckwith, you have 3 minutes remaining.

REBUTTAL ARGUMENT OF CORINNE BECKWITH

ON BEHALF OF THE PETITIONER

MS. BECKWITH: Turning to the actual question presented in this case, there is no justification for the Sixth Circuit's rule extending the Heck favorable termination requirement to prison hearings that don't involve the fact or duration of custody. Congress could have amended 1983 to say that, but we know from the PLRA they looked at the same considerations, they did something different. The Sixth Circuit is an outlier here, as Justice O'Connor said, because there's no - there's no conflict with habeas in a - in a matter like this.

As to all of the other questions that have come up during this argument, this case came to this Court in the posture where there were no good-time credits and there was no exhaustion question. Now, we think we can overcome those problems, but I don't think this Court needs to.

And the - the government has never cited any laws that says the guard's retaliatory conduct violating Mr. Muhammad's First Amendment rights would have been a defense, and we know of none. They argued that it was -

it was relevant to credibility. They argued that that was some kind of a but-for relationship, but victory in the 1983 suit does not affect the adjudication for insolence in this claim. All of this only matters if good-time credits are at issue.

And putting all of that aside, we just agree with Justice Breyer that then this is an easy case in our favor. If there are no further questions from the Court, we'd ask that you reverse the Sixth Circuit.

CHIEF JUSTICE REHNQUIST: Thank you, Ms. Beckwith. The case is -

(Whereupon, at 11:59 a.m., the case in the above-entitled matter was submitted.)